adoption and implementation of reporting requirements, where an operator opposes a certification based on the presence of effective competition, the Commission must undertake an inquiry and where necessary, obtain from all multi-channel video providers in each franchise in issue information sufficient to resolve the issue.

F. Decertification Should be Self-Executing Upon Agreement Of A Franchising Authority And A Cable Operator.

If a cable system that has been previously regulated becomes subject to effective competition, the recognition of that change in status should be made expeditiously. A change in an operator's status is properly the basis for a petition of revocation because the legal premise for the certification no longer exists. To expedite the decertification process, the Commission should permit agreement by an operator and franchising authority that effective competition is present in the cable community. Immediately thereafter, an operator would no longer be subject to rate regulation, and the franchising authority would then certify to the Commission that its certification should be cancelled because of a change in the status of the system.[75/] The decertification mechanism would

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75/ Section 76.33(a)(4) of the Commission's current regulations provides that where a cable system becomes subject to effective competition, the right of the local franchising authority to regulate the basic cable service rates of such a system shall terminate immediately. Only where disputes arise between a franchising authority and a cable operator regarding changed circumstances should the *status quo* be maintained until the matter is resolved by the parties or by the Commission. 47 C.F.R. § 76.33(a)(4).

therefore be self-executing whenever the parties were in agreement that effective competition was present.

G. Basic Rate Certification Procedures.

The Commission has been directed to prescribe regulations that reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission. As discussed above, a benchmark approach to rate regulation will most likely lend itself to achieving this result.

An operator should be permitted to implement a rate increase that falls within a basic service benchmark (or alternative test established by the Commission) without prior approval thirty (30) days after notification to a franchising authority. An operator should advise the franchising authority that the rate falls within the relevant benchmark at the time of such notification.

Where the proposed rate increase does not fall within a prescribed benchmark, a franchising authority should have no more than sixty (60) days to review the proposal, and if it does not act within that time, the increase would take effect.

For existing rates, a cable operator may be required to provide the franchising authority with information as to whether the rate conforms to an appropriate benchmark, or alternatively, provide justification for the current rate. Where a rate conforms to an existing benchmark, it is presumed to be reasonable and, thus, would remain in effect until and unless the operator decides to change it. Where a rate exceeds a benchmark, it would be subject to regulatory oversight

but it, too, would be assumed to be reasonable if the franchising authority takes no action after sixty (60) days.

H. A Franchising Authority's Decision To Deny A Rate Increase Or To Alter An Existing Rate Must Be Supported By Substantial Evidence.

The Commission does not propose to require formal hearings to adjudicate rate disputes, but proposes instead that a franchising authority issue a written decision explaining its disposition of each rate increase request. A franchising authority must be required to provide substantial written evidence to support any decisions which are adverse to the operator. Where an operator submits a showing to demonstrate that its proposed increase is reasonable, although above a benchmark, and a franchising authority disallows the increase, the Commission's rules should require the franchising authority to address such evidence in its decision. If a franchising authority concludes that a current rate does not conform to an existing benchmark, or that the operator has not provided justification for the higher rate, it must require the operator to conform the rate to the benchmark established under the Commission's regulations, subject to the operator's right to appeal. *See* discussion at Part VI(J).

I. Local Franchising Authorities Should Not Be Permitted To Obtain Information From Cable Operators When Rates Or Rate Increases Are Below The Benchmark.

The Commission should implement confidentiality restrictions on the information that local franchising authorities are permitted to obtain when investigating basic cable rates. A franchising authority should not be able to

obtain information from an operator regarding basic cable rates where the rates are below a benchmark or conform to any other index that the Commission may adopt. Similarly, if an operator proposes a rate increase that is at or below a benchmark, access to information should be prohibited. Where an operator is required to supply information to a franchising authority to support an existing rate or a rate increase that exceeds the benchmark, a franchising authority should be required to afford confidentiality to such information in accordance with the Commission's regulations and procedures where an operator requests confidentiality.[76/] The Commission's regulations should require that franchising authorities adhere to confidentiality requests as a condition for certification.

J. Appeals Of Rate Decisions Should Be Made To The Commission.

The Commission seeks comment on the "appropriate forum for appeals of local authorities' rate decisions."[77/] The Commission notes that a review of rate decisions to the Commission "might assure a more uniform interpretation of the standards and procedures adopted pursuant to the 1992 Act."[78/]

For sound reasons, CVI urges that the Commission, rather than state or municipal courts, should review basic rate decisions. The implementation

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76/ *See* 47 C.F.R. §§ 0.457 - .459.

77/ *Notice* at ¶ 87.

78/ *Id.*

of rate regulation standards and procedures by franchising authorities must comport with the Commission's rules. If rate decisions are adjudicated by state and local courts, there will soon be varying interpretations of the Commission's standards and regulations across the nation instead of a set of federal standards to guide operators and franchising authorities.[79/]

Section 623(a)(5) directs the Commission, upon petition by a cable operator or another interested party, to review a franchising authority's regulation of cable system rates. If the Commission finds that the franchising authority has acted inconsistently with the requirements of the section, the Commission must grant appropriate relief.[80/] Reviewing a decision to deny a rate increase will invariably require interpretation and application of Commission standards and procedures as applied by the franchising authority. If the Commission is called upon to review some, but not all such disputes, (depending upon the nature of the appeal and whether a franchising authority has misapplied a regulation in determining whether a basic rate is reasonable), there is a greater likelihood that the regulations will be applied inconsistently from city to city and state to state. The Commission has often recognized the benefit and necessity of uniformity,

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79/ In some cases, a cable system may serve communities in more than one state. Rate disputes relating to the same system could be reviewable in different courts, and inconsistent decisions could even be rendered on a rate dispute decision for the same system.

80/ *See* 47 U.S.C. § 543(a)(5)(A).

consistency, and efficiency of its policies.[81] The review of rate decisions by state or federal courts would not only create a patchwork of case law, it could seriously complicate the exercise of the Commission's responsibilities regarding rates for programming services and disrupt the Commission's own scheme for regulating programming service rates. Because there are common costs associated with the rates for basic and a review of programing services, a review of basic cable rate decisions by local courts and programming service complaints by the Commission would inevitably result in an inconsistent application of Commission policies.

K. Compliance Powers.

The Commission seeks comment on the manner in which franchising authorities will monitor a cable operator's compliance with the Commission's regulations. In particular, the Commission is concerned: (1) whether a franchising authority could order refunds if an operator failed to comply with a rate decision; (2) whether remedies such as revocation of franchises and fines would be available under state or local law; and (3) whether the Commission could impose forfeitures upon cable operators for failing to comply with franchising authority decisions that are consistent with the Commission's rules.[82]

81/ The Commission has recognized the benefits of uniformity in other contexts. *See, e.g., Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469, 503-5 (1981), *aff'd on recon. Cellular Communications Systems,* 89 F.C.C.2d 58, 94-6 (1982) (preempting state regulation to assure uniformity of technical standards and market structure.)

82/ *Notice* at ¶ 86.

Franchising authorities are authorized pursuant to Section 623(a) of the 1992 Act to regulate basic service rates in a manner consistent with the 1992 Act and Commission regulations.[83/] Franchising authorities should have primary responsibility to enforce regulations where charges for basic service are inconsistent with the Commission's procedures and policies. For example, a franchising authority could require an operator to modify its rates to conform to a Commission benchmark.

The 1992 Act does not provide a franchising authority the power to order a refund. Enforcement of rate matters through remedies such as fines or forfeitures should be available where authorized under the franchise or state or municipal law."[84/] Otherwise, a franchising authority does not have the power to impose fines on a cable operator. Where the Commission regulates basic service rates, it will also have the power to impose fines or other enforcement remedies, under Section 623(a)(6).

L. Where Certification Has Been Denied Or Revoked The Commission Should Adopt Procedures To Regulate Basic Rates Which Are Similar To Those Prescribed For Franchising Authorities.

Where certification has been denied or revoked pursuant to Section 623(a)(6), rates should be regulated by the Commission generally in accordance with procedures that have been prescribed for the regulation of basic service rates

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83/ 47 U.S.C. § 543(a).

84/ *Notice* at ¶ 86.

by franchising authorities, except that the Commission may have to adjust filing and notice deadlines where it asserts rate jurisdiction.

In keeping with the requirement of the statute that interested parties be provided with an opportunity for comment, regulations should provide that interested parties file comments on the rate increase within thirty (30) days, and that an operator should file a response within fifteen (15) days.

Where an operator implements a rate increase that is below a benchmark established by the Commission (or some other standard the Commission adopts), it should automatically become effective within thirty days after notification to the Commission and the franchising authority. Indeed, the rate increase should take effect regardless of any formal opposition subject to a refund if the Commission determines that the new rate is not reasonable and does not actually comport with the Commission's criteria.

Where the operator knowingly seeks a rate increase that exceeds the benchmark level, the rate should automatically take effect within ninety (90) days. This period of time should provide the Commission with an opportunity to review the increase, and to make a determination whether it is reasonable after considering the justification that the operator files in support of the increase.

As for existing rates, operators should not be required to file a rate schedule, nor should the Commission be required to review a system's rates, unless a franchising authority, upon the denial of certification or revocation, requests that the cable system be required to file a rate schedule with the Commission.

Interested parties should have thirty (30) days to file comments with the Commission upon submission of the rate schedule, and current rates that are at or below within applicable benchmarks should be presumed valid. As with the case of requests for rate increases, upon the filing of an opposition to an existing rate by an interested party alleging that existing rates are not reasonable, the Commission should consider the justification authority submitted by the cable operator, and shall make a determination whether the rate is reasonable within ninety (90) days.

In a case where an unresolved question of fact exists, the Commission should employ the same hearing procedures to determine whether the proposed rates are reasonable as it uses to determine whether cable programing rates are unreasonable.

VII. REGULATION OF PROGRAMMING SERVICES.

A. Programming Services Complaint Procedures.

The Commission must adopt procedures to determine expeditiously whether a rate is unreasonable and to dismiss frivolous complaints. As noted in Part III, the adoption of a benchmark approach to regulation of cable programming services will facilitate this task. Rates that fall at or below benchmarks can be easily identified and complaints alleging that those rates are unreasonable can be quickly dismissed.

Any complaint to the Commission should contain a certification that copies were served on the cable operator.[85/] An operator should not automatically be required to respond to all complaints filed with the Commission. The Commission staff should conduct a preliminary review to determine whether the complaint meets a minimum showing. Defective complaints alleging that rates are unreasonable should be dismissed.[86/] If the staff is unable to determine whether a rate falls within an appropriate benchmark, information can be obtained from the operator to make that determination. If the staff then determines that the rates are within the benchmark, no further response by the operator should be required and the complaint would be dismissed.[87/]

Upon a determination by the staff that the rates for programming services exceed a relevant benchmark, an operator should be given the opportunity to demonstrate that the rates are nonetheless not unreasonable. An operator should be able to submit any information which it believes is relevant to this determination.

85/ CVI agrees that 30 days would be an appropriate time period within which to file a complaint that the rates are unreasonable.

86/ At a minimum, a complaint should include all relevant information about the complainant, the name of the operator charged, and a statement of the facts showing that rates are unreasonable. *See, e.g.*, 47 C.F.R. § 1.716 (detailing the requirements for informal complaints against common carriers).

87/ Unless the Commission delays implementation of rate regulations to obtain information from cable systems with which the Commission can determine the system's appropriate benchmark, when the regulations become effective the Commission will not have information on file with which it can determine whether an operator's rate for cable programming services is unreasonable.

The Commission should adopt procedures for hearings on cable programming service complaints that are consistent with the Commission's policies on hearings in other rate-related proceedings. When it is alleged that a common carrier's rates are unreasonable, the Commission does not have the discretion to resolve a complaint proceeding without a full hearing unless it determines that a hearing is not needed to resolve disputed questions of fact.[88/] The two-part procedure for determining whether hearings are necessary requires the Commission to ensure that the public interest, convenience, and necessity would be served by granting a hearing,[89/] and to grant a hearing unless no material facts are disputed.[90/]

This two-part standard has been applied by the Commission in deciding whether hearings are appropriate in telephone license disputes,[91/]

88/ *Connecticut Office of Consumer Counsel v. AT&T Communications*, 4 FCC Rcd 8130, 8133 (1989). *See also, Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 104 F.C.C.2d 451, 460 (1985) ("[I]t is black letter law that when the decisionally-significant facts in a complaint proceeding pursuant to Section 208 of the [Communications] Act . . . are undisputed, . . . we have ample discretion . . . to resolve the matter upon the basis of evidence of record without need of resorting to time-consuming and costly full evidentiary proceedings").

89/ *See, e.g.*, 47 U.S.C. § 309(a).

90/ 47 U.S.C. § 309(d)(2).

91/ *West Michigan Telecasters v. FCC*, 396 F.2d 688, 690 (D.C. Cir. 1968) ("Section 309(d) of the Act provides that, when the Commission finds there are no substantial and material questions of fact and a grant of the application would be consistent with the public interest, it shall make the grant requested.").

petitions for review of denials of cellular applications,[92] and petitions for license transfers.[93] Adoption of similar procedures to determine whether rates for programming services are unreasonable would comply with the 1992 Act and would provide a consistent forum for the resolution of these disputes.

The Commission seeks comment on the *ex parte* restrictions that should be adopted for complaint proceedings. The Commission should not adopt *ex parte* regulations until the Commission determines that a material fact is in dispute and formal hearing procedures are therefore necessary.[94] The most efficient procedure is to have cable operators, at the outset, file information on the franchise area they serve, their rate structure, compliance with the benchmark standard, and any other information that would be relevant were a complaint filed.[95] Any complaint that raises a disputed issue of fact should require a non-restricted proceeding and become subject to "permit but disclose" *ex parte*

92/ *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) ("Under Section 309(d)(2) the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented"), *citing Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

93/ *Astroline Communications Co., Ltd. v. FCC*, 857 F.2d 1556, 1561. (D.C. Cir. 1988) ("Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it should conduct a hearing in accordance with [Section 309]").

94/ *Notice* at ¶ 109.

95/ The operator should be permitted to classify these filings as confidential to the extent necessary, as discussed below. *See* Part VII(c), *infra.*

obligations.[96] If a complaint reaches this phase, the Commission should invite further information from the cable operator. If, after inquiry, material issues of fact remain in dispute, the Commission should designate a hearing to settle the dispute.[97] In such cases, the Commission could treat the proceeding as a restricted proceeding and impose the *ex parte* restrictions.[98] When a hearing is required, the Commission should impose the separated trial staff regulations and designate counsel to represent the Commission[99] who is subject to the same *ex parte* restrictions as counsel for the cable operator. The Commission should also adopt policies to prevent disclosure of confidential information during the pre-hearing stage.

When there is a risk that proprietary information may be revealed if *ex parte* presentations are not restricted, the Commission should implement procedures to protect this information, upon the operator's showing that the information is confidential. Such restrictions are currently applied to protect information when record inspection requests are filed with the Commission.[100]

96/ 47 C.F.R. § 1.1206. The Commission suggests this alternative in the *Notice*. *See Notice* at ¶ 109.

97/ As the Commission notes, due process rights of cable operators must be safeguarded. *Id.* at ¶ 109 n.144 and accompanying text.

98/ 47 C.F.R. § 1.1208.

99/ *See* 47 C.F.R. § 1.1202(c).

100/ *See* 47 C.F.R. §§ 0.457 - .459.

B. Burden Of Proof

The burden of proof in Section 309 proceedings is generally on the complainant to establish that rates are *prima facie* unreasonable. The burden of proceeding then shifts to the defendant.[101/] Thus, if the complainant in a carrier rate increase dispute fails to demonstrate *prima facie* that the defendant's rates are unlawfully high,[102/] the burden of proceeding does not shift to the defendant. The same approach should be adopted here. The complainant has the burden to establish that rates for cable service programming are unreasonable. This could be demonstrated by a showing that programming service rates exceed the relevant benchmark. The burden then shifts to the operator to provide information to justify the rates to rebut the *prima facie* presumption.

C. The Commission Should Not Disclose Cost Information Submitted By A Cable Operator In Response To A Complaint Regarding Rates.

The Commission seeks comment on the treatment of information which may be necessary to resolve a dispute regarding rates, but which the cable operator regards as proprietary. The Commission asserts that "the burden should be firmly on the cable operator involved to demonstrate that significant competitive injury might result from any disclosure. . . ." *Notice* at ¶ 106. This

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101/ *Connecticut Office of Consumer Counsel*, 4 FCC Rcd at 8133.

102/ *MCI Telecommunications v. Southern Bell*, 4 FCC Rcd 8135, 8136 (1989).

position is inconsistent with prior decisions of the Commission and the federal courts. The burden should be placed on the complaining party.[103/]

Section 0.457(d) of the Commission's rules states that the Commission has the authority to protect confidential trade secrets as well as commercial and financial information from disclosure to the public. 47 C.F.R. § 0.457(d); *see also* 5 U.S.C. § 552(b)(4) (Freedom of Information Act). Rule 0.457(d) should be amended to include information submitted by a cable operator in response to a complaint that the basic rates charged by an operator are above the pertinent benchmark or that its cable programming services rates are unreasonable.[104/] This amendment would comport with judicial decisions holding that disclosure of financial information is not appropriate when it would cause substantial competitive harm to the party that submitted the information. *See Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*Nat'l Parks I*).

An operator whose rates are above benchmark levels will almost always submit information to the Commission of a detailed and proprietary cost

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103/ To the extent that a franchising authority has a contractual right to access information that an operator might otherwise regard as proprietary, such information could be obtained pursuant to the provisions of the franchise agreement.

104/ The Commission is already authorized to apply this non-disclosure rule to other financial reports that might be filed by cable systems. *See* 47 C.F.R. §§ 0.457(d)(1)(iii), (iv).

character.[105] The Commission should amend Section 0.457(d) to prevent disclosure of this type of information.

The Commission has previously acknowledged that cost data "have been recognized by the courts as a category of information with considerable competitive implications. . . . It is 'virtually axiomatic' that disclosure of detailed financial data showing costs and revenues" would cause substantial competitive harm. *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 5058, 5060 (1991), *citing Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976).[106]

Not only system operators but third parties may be adversely affected by disclosure.[107] This is a particularly important issue as it affects third parties such as equipment suppliers and programmers because disclosure of an operator's costs may reveal the price that was paid to a particular supplier. Since the supplier is not a party to the dispute, the Commission is obliged to consider the supplier's interests in formulating the rules that will govern disclosure.

105/ This information would also be provided if the Commission did not use benchmarks and relied upon cost support data.

106/ Where a party seeking nondisclosure is generally protected from competition, it is still possible that disclosure could cause substantial competitive harm. *See Nat'l Parks I*, 498 F.2d at 770.

107/ *Notice* at ¶ 106.

If the Commission decides to protect against disclosure, a party who believes that it is entitled to the information may file a request for disclosure pursuant to the Commission's rules. *See* 47 C.F.R. § 0.461. However, resolving complaints over unreasonable rates does not normally require an adversary proceeding in which due process demands disclosure. Complainants have not been given standing by the Act to prosecute complaints, but only to bring their concerns to the attention of the FCC. From that point on, the Commission is the acting party, not the complainant.

D. Refund Procedures

The Commission is empowered to require an operator to set a rate which comports with the relevant benchmark, and if necessary, order refunds to affected subscribers.[108/] In keeping with the 1992 Act's mandate to fashion expeditious procedures, the Act permits rate reductions for program service rates, and the Commission should design an easily implemented reduction/refund provision. The Commission's proposal of a *pro rata* reduction of rates for all those who subscribe to the affected programming service tier would be the most

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108/ *Notice* at ¶ 106. Since the Commission is authorized to "reduce rates for cable programming services," it implicitly has the power to prescribe rates that are unreasonable. 47 U.S.C. § 543(c)(1)(C).

expeditious and the least expensive alternative for compensating affected subscribers.[109/]

The Commission proposes that operators whose rates are found to be unreasonable should make rate reductions promptly, and suggests that 30 days would be an appropriate time period to make the reductions. However, a procedure-based deadline would be better. Rate refunds should only be made after appeal of a final decision is completed and all remedies available to the operator are exhausted.

The Commission reviews two alternatives that could be used for refunds. In the first alternative, refunds would be issued to those who actually paid the overcharges. In the second, refunds would be made to subscribers as a class. CVI believes that it would be almost impossible to determine who paid the overcharge, and they agree with the approach of imposing a prospective percentage reduction to cover the cumulative overcharge, and to reflect the reduction in invoices sent to the class of subscribers that had been subject to the unreasonable rate. After a final determination that the rates should be reduced and the overcharges returned, an operator should have a reasonable amount of time to adjust accounting and billing records. CVI believes that it would be reasonable to expect that the refund process could begin within two billing cycles

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109/ The Commission seeks to keep these procedures simple and informal. *Notice* at ¶ 109. The House Report also indicates that the Commission is "required to establish fair and **expeditious** procedures for the receipt, consideration, and resolution of complaints. . . ." House Report at 87 (emphasis added).

from the date that rate refund decision is final to ensure that refunds are properly credited.[110/]

E. The 1992 Act Does Not Require That Rates Be Uniform On A System-Wide Basis.

Section 623(d) provides that a cable operator shall have a rate structure for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system. The Commission seeks comment on the meaning of the term "geographic area" under Section 623(d), and whether it refers to uniform rates throughout the geographic area that is served by the system or throughout a franchise area.

Defining geographic area to mean the contiguous area served by a cable system, rather than the franchise area which is served, is inconsistent with the statute's legislative history as expressed in S. Rep. No. 92, 102d Cong., 1st Sess. ("Senate Report"). The Senate Report provides that "cable operators must offer uniform rates throughout the geographic area in which they provide services. This provision is intended to prevent cable operators from implementing different rate structures in different parts of **one cable franchise**. This provision is also intended to prevent cable operators from dropping the rates in one portion of a

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110/ This amount of time is necessary to ensure that operators have sufficient time to adjust their billing records and automated billing systems.

franchise area to undercut a competitor temporarily."[111/] The Commission should nevertheless recognize that Section 623(d)'s the requirements will pose a dilemma for an operator faced with an "unfair" competitive situation. If a second multi-channel video programmer serves a highly penetrated portion of a large franchise, declining to serve other portions, the existing operator must either lower rates throughout the entire franchise to meet a competition, possibly at artificially low rates, or hold rates constant and lose subscribers.[112/]

Even if the new entrant may bring some competitive benefits to consumers in the area receiving dual service, others in the franchise area may be less fortunate. The ability to maintain existing service levels and also provide new services will be adversary affected if artificially low rates must be maintained throughout a franchise area. (This situation will be exacerbated if the Commission interprets geographic area as the entire area served by a cable system.) At some point the ability to continue providing service to less densely populated areas may even be put at risk. Congress meant to create a competitive environment to promote service opportunities, not one that would diminish them. To mitigate this problem, the Commission should entertain petitions for waiver of Section 623(d) when an operator can demonstrate that, absent a waiver, the

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111/ Senate Report at 76 (emphasis added). *See also* 138 Cong. Rec. S14,248 (daily ed. Sept. 21, 1992) (Statement of Sen. Gorton) ("These provisions encourage competition . . . by forbidding a cable system from offering differing prices within a franchise area. . . .").

112/ A "greenmailer's" ability to use Section 623(d) to its advantage is still a very real impediment to a fair playing field, despite a franchising authority's power to regulate the sale of competitive systems pursuant to Section 533(b)(2).

ability to provide services at the same levels, or to introduce new services to its subscribers will be adversely affected.

Despite some concerns expressed in the Notice, there are other reasons why the Commission should adopt the view that the term geographic area means franchise area. If geographic area is defined as the entire contiguous area served by the cable system, rather than just a franchise area, the necessity to offer uniform rates would require that the operator cross-subsidize the rates of certain subscribers. Operators who serve multiple service areas will often encounter different service requirements. For instance, the requirement to provide sophisticated origination facilities or more elaborate access facilities in one franchise area will entail higher subscriber fees in that area; otherwise, one franchise area would end up subsidizing another. As the Commission notes, "different franchises within a system could have differing costs. . . . [C]osts may vary due to differing franchise fees, density of homes passed, the age of the facilities, or many other factors."[113/] Under these circumstances, the only practical method of maintaining a uniform rate structure would be to cross-subsidize rates within the entire geographic area that is served by a single system,[114/] and this would discriminate against certain subscribers.

113/ *Notice* at ¶ 115.

114/ The Commission asks whether Congress intended to require or permit cross-subsidization. Given the text of the Senate Report, however, this is unlikely. *Notice* at ¶ 115. *See* Senate Report at 76.

The fact that Congress did not require all franchising authorities served by the same operator to file a joint certification with the Commission is consistent with this interpretation.[115/] Joint certifications would have been required if Congress had intended that rates be uniform throughout a multi-franchise service area. Instead, the statute gives each franchising authority the right to regulate basic service rates, reflecting Congress' intention that, as a result of negotiations for the initial grant or renewal of a franchise, rates could differ from community to community.

Moreover, practical concerns dictate that the Commission should interpret the term geographic area as synonymous with franchise area. If Section 623(d) is interpreted to require uniform rates throughout a system's entire service area a franchising authority would be able to demand that an operator accede to its requirements knowing that higher costs to serve a community could be spread over a system's entire subscriber base, including those in neighboring franchise areas.

F. Sections 623(d) And 623(e) Are Not Duplicative.

The Commission is concerned that "if the meaning of geographic area is limited to a franchise area, Section 623(d) . . . would be duplicative of

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115/ *Notice* at ¶ 21. The House Report states that the certification provision is not intended to require franchising authorities to exercise joint regulatory authority, nor should it be interpreted to prohibit joint authority. *See* House Report at 80.

Section 623(e); different rate structures within a franchise area could be prevented by anti-discrimination rules."[116/] These provisions are not duplicative.

Section 623(d) is meant to maintain a uniform rate structure within a franchise area. Section 623(e) allows federal, state, and franchising authorities to prohibit discrimination among subscribers to cable service within the area. While Section 623(d) addresses uniformity of rates for cable service, Section 623(e) addresses discrimination in the **provision of cable services**. Though rates would be uniform within a franchise area, operators could not discriminate in delivery of services. Thus, authorities may prohibit cable operators from denying services to some subscribers within a franchise area, while offering those services to others. For example, a system that maintained a converter deposit policy could not alter the policy to require higher deposits in some areas of a franchise than others.

Congress, having established a uniform rate structure throughout a franchise area, still intended that federal and state authorities should be able to pass laws which would protect against discrimination. At the same time, Congress made it clear that offering reasonable discounts to senior citizens and economically disadvantaged groups would not be discriminatory.

The Commission asks how the uniform rate provision of the 1992 Act[117/] should be implemented with regard to multi-dwelling units ("MDUs"),

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116/ *Notice* at ¶ 114.

117/ 47 U.S.C. § 543(d).

medical and educational institutions, and other large residential communities or buildings.[118/] CVI submits that Section 623(d) does not apply to these types of subscriber accounts. Cable operators should be permitted to negotiate rates, on a case-by-case basis, with MDUs and commercial accounts.

The legislative history of S.12, from which the uniform pricing provision was adopted, discusses the purposes of the uniform rate provision in the bill: "This provision is . . . intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily."[119/] The Senate debate on the Conference Report expressed the same concern: "[The uniform pricing provision] encourage[s] competition by . . . forbidding a cable system from offering differing prices within a franchise area in order to drive out competition where it exists only to later raise their rates when their competitor is driven out."[120/]

Section 623(d) was not meant to proscribe service agreements between operators and MDUs, commercial accounts, or other subscribers which receive service on a bulk basis. Cable operators should therefore be permitted to negotiate individual rate packages with MDUs and similar type accounts. The 1992 Act permits operators to provide different classes of service, and these would typically include individually negotiated service contracts. Operators must

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118/ *Notice* at ¶ 112.

119/ Senate Report at 76 (1992).

120/ 138 Cong. Rec. S14,248 (daily ed. Sep. 21, 1992).

have the flexibility to provide service pursuant to individually negotiated agreements in order to be able to compete with SMATV and MMDS systems which have no constraints on their ability to negotiate with owners and managers of MDUs and commercial accounts.

G. Section 623(b)(7)(A) Provides Operators With The Flexibility To Determine The Components Of The Basic Service Tier.

The Commission seeks comment on whether "cable operators may add any and as many video programming services to the basic tier as they wish, provided that such services are subject to basic rate regulation."[121/] An operator should be permitted to offer as many (or as few) channels in a basic tier, including video and non-video services, as long as the minimum requirements of Section 623(b)(7)(A) are met.[122/] At a minimum the basic service tier must consist of all must-carry channels, all PEG programming channels, and aside from satellite-delivered signals, all other broadcast signals. But operators are also permitted to add additional video programming signals or services to the basic tier, provided that service rates conform to the basic tier rate regulations.[123/]

Any franchise provision that requires operators to provide a fixed number of channels in the basic cable service tier is incompatible with Section 623(b)(7)(A) because it prevents an operator from offering a basic service that

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121/ *Notice* at ¶ 11.

122/ 47 U.S.C. § 543(b)(7)(A).

123/ 47 U.S.C. § 543(b)(7)(B).